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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Michael Gallegos,

Petitioner,

vs.

David Shinn, Director, Arizona
Department of Corrections,
Rehabilitation & Reentry, et al.,

Respondents.

No. CV-01-01909-PHX-NVW

DEATH-PENALTY CASE

**Motion to Vacate Current
Scheduling Order and Reschedule
Evidentiary Hearing**

First Request

Petitioner respectfully asks this Court to vacate the current scheduling order pursuant to Federal Rule of Civil Procedure 6(b) and Local Rule of Civil Procedure 7.3(a), and set a status conference on January 29, 2021. Respondents' counsel does not oppose the request. This is Petitioner's first request for additional time, and extraordinary circumstances justify this extension of time. This motion is based upon the attached memorandum.

SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES**Background**

On February 20, 2020, this Court granted Petitioner's request for an evidentiary hearing permitting him an opportunity to validate what this Court characterized as a substantial claim that his death sentence may have been unlawfully obtained in violation of his Sixth Amendment right to the effective-assistance-of-counsel. (ECF No. 160.) In response to the Court's order, the parties proposed a schedule for disclosure of exhibits and witnesses, production of expert reports, interviews of experts and lay witnesses and other preparatory matters, with a hearing to commence in May 2021. (ECF No. 165 at 5.) In material respects, the parties had adopted and then proposed the pre-hearing scheduling timetables that had been approved by this Court in several other cases; a schedule which afforded the parties at least a year to prepare for a hearing, while counsel attend to a demanding capital habeas caseload with attendant obligations to other clients and corresponding district and appellate court demands. *See*, Order, *Lopez v. Stewart*, CV-97-00224-TUC-CKJ (D. Ariz. Nov. 20, 2015), ECF No. 174; Order, *Salazar v. Ryan*, CV-96-00085-TUC-FRZ (D. Ariz. Sept. 19, 2016), ECF No. 227; Order, *Jones v. Ryan*, CV-01-00592-TUC-TMB (D. Ariz. Jan. 23, 2017), ECF No. 186; Order, *Cruz v. Ryan*, CV-13-00389-TUC-JGZ (D. Ariz. Apr. 3, 2018), ECF No. 61.

Previously, in these other hearing scheduling matters, the Court had accepted counsel's representation of the time necessary to complete pre-hearing investigations and disclosures, and to prepare for a hearing. In these proceedings, Petitioner's counsel believed that these same necessities warranted their request for a May 2021 hearing, but here the need for the requested timeframe is even more crucial. First, Petitioner's prior counsel resigned from the Federal Defender's office (ECF No. 156; ECF No. 159), and no attorney in the office had any substantive knowledge of Petitioner's case. In addition, Petitioner needed to retain two new expert witnesses to replace others who had died or retired. Undersigned counsel had

1 never met with the witnesses or investigated whether the probable witnesses had
2 *more* to say. What is more, the proposed hearing in May 2021, seemed reasonable
3 in light of the fact that the President of the United States had declared a National
4 Emergency caused by the most deadly pandemic in more than a century.

5 Nonetheless, this Court expressed its preference that the parties propose a
6 scheduling timetable that would result in a hearing commencing within six months
7 and accordingly scheduled the evidentiary hearing to begin November 9, 2020.
8 (ECF No.173 at 1.) Subsequently, this Court ordered that counsel, the Petitioner,
9 and any testifying witnesses would need to appear in person for the hearing. (ECF
10 No. 188.)

11 Petitioner's counsel submit that they have made every reasonable effort to
12 comply with the Court's scheduling order. They have conducted witness interviews
13 and expert witness communications by telephone or video-conference,
14 communicated with Petitioner by telephone to prepare him for this hearing, and thus
15 far complied with this Court's scheduling order. To date, counsel has received one
16 expert report, but it still awaiting a second report from a newly obtained expert
17 (ECF No. 181-1.) However, counsel must inform the Court that they cannot in good
18 faith be prepared to complete the tasks required by the current scheduling order in
19 a reasonably competent manner, or be prepared to effectively present evidence for
20 the evidentiary hearing in early November. The pandemic has placed effective and
21 competent performance of counsel out of reach. The pandemic has placed
22 limitations on the legal profession and the operations of the courts throughout
23 Arizona.

24 The United States Secretary of Health and Human Services declared COVID-
25 19 a public health emergency on January 31, 2020.
26 [https://www.hhs.gov/about/news/2020/01/31/secretary-azar-declares-public-](https://www.hhs.gov/about/news/2020/01/31/secretary-azar-declares-public-health-emergency-us-2019-novel-coronavirus.html)
27 [health-emergency-us-2019-novel-coronavirus.html](https://www.hhs.gov/about/news/2020/01/31/secretary-azar-declares-public-health-emergency-us-2019-novel-coronavirus.html) (last visited Aug. 27, 2020).
28 The President of the United States then declared a National Emergency on March

1 13, 2020. Proclamation No. 9994, 85 Fed. Reg. 15337, 2020 WL 1272563 (Mar. 13,
2 2020).

3 On that same day, the Chief Judge of the District of the Arizona, the
4 Honorable G. Murray Snow, also entered an order virtually suspending all court
5 operations, which substantially limited progress in most, if not all, criminal matters
6 pending in this District. General Order 20-10, *In the matter of Court Operations*
7 *Under the Exigent Circumstances Created by Corona Virus Disease (COVID-19)*
8 (D. Ariz. Mar. 13, 2020), [http://www.azd.uscourts.gov/sites/default/files/general-](http://www.azd.uscourts.gov/sites/default/files/general-orders/20-10.pdf)
9 [orders/20-10.pdf](http://www.azd.uscourts.gov/sites/default/files/general-orders/20-10.pdf). Since then, Chief Judge Snow's Order has been supplemented
10 almost fifteen times; its effects on court operations persist up to this day.

11 On March 30, 2020, Governor Doug Ducey issued a shelter-in-place order
12 for all residents. Executive Order 2020-18, *Stay Home, Stay Healthy, Stay*
13 *Connected Physical Distancing to Mitigate COVID-19 Transmission* (Mar. 30,
14 2020), <https://azgovernor.gov/executive-orders> (last visited Aug. 27, 2020)¹. Due
15 to Arizona's severe increase in COVID-19 cases and having one of the highest
16 numbers of COVID-19 cases in the country, Governor Ducey issued another
17 Executive Order delaying the reopening of Arizona. Executive Order 2020-43,
18 *Pausing of Arizona's Reopening Slowing the Spread of COVID-19* (June 29, 2020),
19 <https://azgovernor.gov/executive-orders> (last visited Aug. 27, 2020). As of August
20 26, in Arizona alone there are over 4,800 deaths due to COVID-19, with new deaths
21 reported each day. Arizona Medical Association, *COVID-19 by the Numbers in*
22 *Arizona*, <https://www.azmed.org/general/custom.asp?page=coronavirus> (last
23 visited Aug. 27, 2020). As of August 27, in the United States there are over 178,000
24 deaths due to COVID-19. Centers for Disease Control and Prevention, *Coronavirus*
25 *Disease 2019 (COVID-19) Cases in the U.S.*,

26
27 ¹ The order was extended twice through May 15, 2020. *See*, Executive Orders 2020-
28 33 (Apr. 29, 2020), 2020-36 (May 15, 2020), [https://azgovernor.gov/executive-](https://azgovernor.gov/executive-orders)
[orders](https://azgovernor.gov/executive-orders) (last visited Aug. 27, 2020).

1 <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last
2 visited Aug. 27, 2020).

3 Courts throughout Arizona suspended jury trials, grand juries, and all in
4 person court appearances. In Arizona, counsel remains subject to the Governor's
5 Executive Orders² and the District Court's Order. Chief Judge Snow is only
6 permitting certain jury trials to proceed. General Order 20-26, *In the Matter of*
7 *Continuing Court Operations Under the Exigent Circumstances Created by*
8 *Coronavirus Disease (COVID-19)*, (D. Ariz. May 28, 2020). The Court did not
9 specify if evidentiary hearings for in-custody defendants may proceed, but
10 cautioned that out-of-custody evidentiary hearings may proceed if the hearings can
11 be held in compliance with CDC guidelines. Accordingly, except in multi-
12 defendant cases, no more than one attorney and one client or client representative
13 may sit at counsel table at any one time. General Order 20-26 at 4. Currently, there
14 are three attorneys of record on this case representing Petitioner and under the
15 current General Order, it would impossible for all three attorneys to be present at
16 counsel table simultaneously. (ECF No. 162; ECF No. 167.)

17 The Arizona Department of Corrections, Rehabilitation and Reentry
18 (ADCRR) suspended all legal and non-legal visitation on March 13, 2020. Arizona
19 Department of Corrections, Rehabilitation and Reentry, *ADCCR Announces New*
20 *Actions to Mitigate COVID-19 Risk*, (Mar. 13, 2020)
21 <https://corrections.az.gov/covid-19-management-updates?page=1> (last visited
22 Aug. 27, 2020). ADCRR suspension continues through September 13, 2020, with
23 additional extensions of the non-visitation rules anticipated. *ADCCR COVID-19*
24 *Management Strategy*, (Aug. 6, 2020) <https://corrections.az.gov/covid-19->
25

26 ² Protocol for review every two weeks and provide for Executive Order 2020-43 to
27 remain in effect. *See*, Executive Order 2020-52, *Continuation of Executive Order*
28 *2020-43 Slowing the Spread of COVID-19*, (July 23, 2020),
<https://azgovernor.gov/executive-orders> (last visited Aug. 27, 2020).

1 management-updates (last visited Aug. 27, 2020).

2 While neither party will suffer prejudice from deferment from the current
3 schedule, enforcement of the current timetable will impede effective representation,
4 hinder adequate preparation for the hearing including presentation of witness
5 testimony, and ultimately pose a substantial risk of irreparable prejudice to the
6 Petitioner: for it is the Petitioner who bears the ultimate burden to prove that the
7 outcome of a constitutionally unjust 1994 resentencing proceeding should be
8 overturned. Conducting the hearing on November 9 also threatens the health of
9 Petitioner, counsel, testifying witnesses, and their respective family members—
10 including immunocompromised members—who are uninvolved in the hearing.
11 Under these circumstances, the equities strongly favor a suspension of the current
12 scheduling order.

13 **Argument**

14 **I. The pandemic has created numerous insurmountable obstacles that** 15 **preclude effective representation.**

16 This Court appointed federal habeas counsel for Petitioner in 2001 in accord
17 with his statutory right to qualified legal representation in this capital case. (ECF
18 No. 6 at 1; *see* 21 U.S.C. § 848(q)(4)(B) (current version at 18 U.S.C. § 3599).) As
19 the Supreme Court has stated, the statute under which Petitioner was appointed
20 counsel “seeks to promote effective representation for persons threatened with
21 capital punishment.” *Martel v. Clair*, 565 U.S. 648, 660 (2012); *see McFarland v.*
22 *Scott*, 512 U.S. 849, 855, 859 (1994) (statutory protections “reflect[] a
23 determination that quality legal representation is necessary” in capital proceedings
24 to ensure “fundamental fairness in the imposition of the death penalty.”); *see*
25 *Christeson v. Roper*, 574 U.S. 373, 377 (2015) (per curiam) (same).

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28 ///

1 Yet, the pandemic has created significant obstacles to achievement of even
2 minimally effective representation by:

- 3 1. Preventing effective communication between Petitioner and
4 counsel and protecting his interests;
- 5 2. Interfering with the investigation of expert evidence and
6 depriving Petitioner of the ability to present expert testimony at
7 the hearing;
- 8 3. Interfering with the investigation of lay-witness evidence and
9 impeding the presentation of lay-witness testimony at the
hearing.

10 **A. The pandemic has interfered with the attorney-client relationship**
11 **and deprived counsel from fulfilling professional and ethical**
12 **duties to effectively communicate with Petitioner and to protect**
13 **his interests.**

14 Despite the pandemic's restrictions on all or almost all facets of
15 representation, the professional norms encapsulated by the 2003 American Bar
16 Association Guidelines continue to govern every stage of a capital proceeding. *See*
17 Guideline 1.1(B) of the ABA Guidelines for the Appointment and Performance of
18 Defense Counsel in Death Penalty Cases ("ABA Guidelines"). The ABA
19 "Guidelines apply from the moment the client is taken into custody and extend to
20 all stages of every case in which the jurisdiction may be entitled to seek the death
21 penalty, including initial and ongoing investigation, pretrial proceedings, trial, *post-*
22 *conviction review*, clemency proceedings and any connected litigation." *Id.*
23 (emphasis added). The ABA Guidelines provide that counsel "should make every
24 appropriate effort to establish a relationship of trust with the client, and should
25 maintain close contact with the client." ABA Guideline 10.5(A). Before the
26 pandemic, Petitioner's counsel had not developed a relationship of trust with him.
27 The attorneys who filed the briefing in support of this claim both departed the
28 office. (ECF No. 156; ECF No. 159.) Only one of his current attorneys has met him
in person. And the attorney who has met Petitioner has only met him once. His other

1 two attorneys were assigned just weeks before the National Emergency was
2 declared on March 13, 2020. (ECF No. 162; ECF No. 167.)

3 The pandemic has obstructed the development of any relationship of trust. A
4 meaningful attorney-client relationship requires that defense counsel spend
5 significant time with their client because “[e]ven if counsel manages to ask the right
6 questions, a client will not—with good reason—trust a lawyer who visits only a few
7 times before trial[.]” *See* ABA Guideline 10.5 cmt. at 1008. “Client contact must
8 be ongoing, and include sufficient time spent at the prison to develop a rapport
9 between attorney and client.” *Id.*; ABA Guideline 10.15.1(E)(1)–(2) (Post-
10 conviction counsel must “maintain close contact with the client” and “monitor the
11 client’s mental, physical and emotional condition[.]”) And the frequent, significant
12 communication is even more pronounced because the Petitioner suffers from life-
13 long permanent cognitive disabilities that impair his judgment and understanding.
14 *See* ABA Guideline 10.5 cmt. at 1007 (“Many capital defendants are, in addition,
15 severely impaired in ways that make effective communication difficult: they may
16 have mental illnesses . . . or have other cognitive impairments that affect their
17 judgment and understanding[.]”)

18 Petitioner’s counsel cannot meet any of these requirements in this
19 environment. As stated before, ADCRR has suspended all legal visits, and visits
20 will continue to be suspended through September 13, 2020. Moreover, counsel
21 cannot meet with Petitioner via videoconference in compliance with attorney-client
22 privilege as ADCRR has stated that any videoconference would be recorded. As a
23 result, there is a real probability that Petitioner will not meet his attorneys in person
24 until the day of the hearing.

25 In addition, Respondents have identified Petitioner as a witness to be called
26 at the hearing and intend to interview him before the hearing. (ECF No. 179 at 2.)
27 ADCRR directives render it impossible for counsel to prepare Petitioner for that
28 interview and prepare him for his hearing testimony. Without consistent and

1 repetitive in-person face-to-face communications, Petitioner's counsel are in no
2 position to effectively prepare him to be interviewed by Respondents or to testify
3 at the behest of Respondents at the hearing.

4 Most importantly, the pandemic prevents counsel from being present with
5 Petitioner to protect his rights during the interview. Minimally competent
6 representation demands counsel be physically present with Petitioner during
7 Respondents' interview of him, so Petitioner and counsel have unobstructed and
8 unlimited access to each other in order to consult privately, should the need arise.

9 The problem cannot be remedied by ordering courthouse consultation.
10 ADCRR will not transport prisoners outside of the prison for matters except for a
11 jury trial. Further, as stated in the attached exhibit, in-person meetings pose threats
12 to the health of the participants, counsel, Petitioner, and the family members of all
13 involved. (*See Ex. A (filed under seal)*³.)

14 Finally, the present unprecedented circumstances are fraught with ethical
15 conflicts. Here, Petitioner's counsel are driven by public health considerations to
16 avoid contact with Petitioner, when their ethical duties demand the opposite. *See*,
17 National Association of Criminal Defense Lawyers, *NACDL Issues Statement of*
18 *Principles and Report—"Criminal Court Reopening and Public Health in the*
19 *COVID-19 Era"* (June 4, 2020),
20 <https://nacdl.org/newsrelease/NewReportCourtReopeningAndCOVID-19>. *See also*
21 *Ariz. R. Prof'l Conduct Rule 1.7(a)(2) (eff. 2003) (representation shall not be*
22 *materially limited by the personal interests of the attorney)*. Simply stated, the
23 pandemic has created a situation in which counsel is unable to provide effective
24 representation to Petitioner based on a conflict between counsel's personal interests
25 in not being exposed or exposing others to the virus and Petitioner's interest in
26 presenting a claim backed by robust support. There is no objective reason for the

27 ³ Petitioner has filed an additional motion to file this exhibit under seal along with
28 a proposed order. The exhibit is attached to that motion.

1 proceedings to rush to a final adjudication, when, as here, the attorney-client
 2 relationship is completely disrupted and counsel lacks the ability to perform with
 3 even minimal competence in order to prepare the Petitioner for interviews or the
 4 hearing.

5 **B. The pandemic has interfered with the investigation of expert**
 6 **evidence and will deprive Petitioner of the ability to present expert**
 7 **testimony at hearing.**

8 Two of Petitioner's mental health experts, Dr. Reschly and Dr. Fassler have
 9 been unable to evaluate the Petitioner in person. As it stands now, neither expert is
 10 willing to travel to Arizona in light of health and safety issues pertaining to the
 11 pandemic, and apart from that, the ADCRR will not allow expert visitations.
 12 Counsel have a duty to present mental health evidence in support of the prejudice
 13 prong of *Strickland*. At a minimum, an in-person evaluation by the mental health
 14 expert is required. *See, e.g., Richardson v. Astrue*, No. 09 Civ. 1841 (SAS), 2009
 15 U.S. Dist. LEXIS 116086, at *24 (S.D.N.Y. Dec. 14, 2009) (“[M]ental disabilities
 are difficult to diagnose without subjective, in-person examination[.]”).

16 This Court has suggested that experts might evaluate Petitioner via
 17 videoconference, but that is a fraught process. *See* David D. Luxton, Larry D. Pruitt,
 18 & Janyce E. Osenbach, *Best Practices for Remote Psychological Assessment via*
 19 *Telehealth Technologies*, 45 *Professional Psychology: Research and Practice*, 1,
 20 27–35 (2014) (“The lack of in-person presence may influence how information is
 21 assessed as well as what can be assessed . . . Further, the lack of physical presence
 22 in itself may influence a patient's clinical presentation.”). ADCRR monitors and
 23 records all videoconferences to ensure Petitioner's compliance with its
 24 videoconference guidelines. In addition, Google controls a recording and creates a
 25 text transcript of the interview. An *open* mental health evaluation as just described
 26 threatens the integrity of the evaluation and alleged results. *See* Luxton, *supra*.

27 To be perfectly clear, even though Petitioner is able to present reliable
 28

1 evidence without having his experts engage in further in-person evaluations, there
2 is no objective reason to deny Petitioner the opportunity to derive relevant evidence
3 that only an in-person mental health evaluation can uncover. In a capital case, where
4 Petitioner's life is at stake, and where the parties agree that they will not be
5 prejudiced by a postponement of the hearing, effective capital counsel have a duty
6 to present expert mental health testimony supported by an in-person evaluation. It
7 is not unreasonable to continue this hearing with the expectation that the mental
8 health evaluation can begin early next year.

9 It is impossible to quantify the expert evidence that would be derived from
10 an appropriate in-person evaluation. The whole purpose of conducting a reliable in-
11 person mental health evaluation is to search for relevant evidence in the first
12 instance. Only *after* investigation can the results of an appropriate in-person
13 evaluation become known. It will not prejudice either party to allow Petitioner to
14 postpone the current schedule to allow a reasonable evaluation process to take
15 place.

16 Beyond the impediments to an appropriate mental health evaluation, serious
17 risks to health and safety will prevent Dr. Reschly and Dr. Fassler from traveling to
18 Arizona for the early November hearing. The Court has previously held that it is
19 unlikely that it will permit video-conferencing of experts' testimony. (ECF No.
20 188.) This in turn would deprive Petitioner of a full and fair hearing on his
21 constitutional claim. It would be manifestly unjust to allow the evidentiary hearing
22 to ensue without affording Petitioner the opportunity to present constitutionally-
23 relevant evidence, particularly in the midst of a public health emergency.
24 Respondents agree with this proposition. No prejudice would ensue by postponing
25 the hearing to allow a fair opportunity for the mental health experts to safely travel
26 to Arizona, likely prior to mid-year 2021, near in time when the parties initially
27 proposed the hearing take place.

28

1 **C. The pandemic has interfered with the investigation of lay-witness**
2 **evidence and will impede the presentation of lay witness testimony**
3 **at hearing.**

4 The current pandemic has impeded and unreasonably limited lay witness
5 investigation and preparation of lay witness testimony. Pre-pandemic, no lawyer
6 worth her salt would prepare a case for trial (or in this case a significant evidentiary
7 hearing) without meeting in-person with key witnesses. Yet, the pandemic has made
8 this necessary aspect of effective advocacy impossible. Effective communications
9 with witnesses have been hampered. Counsel have a duty to thoroughly investigate
10 mitigation. *Porter v. McCollum*, 558 U.S. 30, 39 (2009). This duty extends to the
11 post-conviction habeas process. *See* ABA Guidelines, 10.15.1(D)(4) (post-
12 conviction counsel have the duty to “continue an aggressive investigation of all
13 aspects of the case.”). Vacating the current scheduling order would allow Petitioner
14 to employ this simple tool of advocacy; to effectively engage with witnesses to
15 further investigate the extent of their relevant knowledge and prepare their ultimate
16 testimony. No prejudice would inure to either party by making allowance for this
17 reasonable and effective form of investigation and preparation to ensue.

18 Specifically, face-to face, at-home interviews are the core of mitigation
19 investigation and take place in circumstances that create a high risk of COVID-19
20 transmission. Due to counsel’s inability to travel because of COVID-19, reaching
21 some witnesses by telephone to schedule interviews has been delayed. Many
22 witnesses have changed telephone numbers and home addresses since our
23 communication with them in 2017, and tracking down new contact information is
24 difficult to do by phone. Our ability to locate and identify active telephone numbers
25 is often limited because Accurint⁴ is not always reliable at reporting current cell
26 phone numbers. Utilities, car ownership and registration, mortgages etc. are

27 _____
28 ⁴ Accurint is a LexisNexis database used to locate and research witnesses.

1 typically tied to a physical address rather than a cell phone number. Therefore,
2 changing cell phone numbers are not accurately updated in Accurint. In addition,
3 because of counsel's concern for witnesses and their health, appearing on a door
4 step if they may have unknown health related issues is not the most conducive
5 approach. Sending letters, although not ideal for any investigation, is impossible to
6 do when counsel is unable to identify an address for one witness after confirming
7 he/she is no longer living at the last known address reported on Accurint. Many of
8 these past months have been spent trying to locate witnesses without having the
9 ability to go out and look for them. To date, there is still one witness that counsel
10 has been unable to locate. Even with witnesses interviewed and updated
11 declarations being prepared, counsel now faces the difficulties in getting these
12 declarations signed without being able to deliver them in person and watch the
13 declarant sign the document.

14 The pandemic will also impede Petitioner from presenting lay witness
15 testimony at the hearing, when witnesses with health and safety risks will not be
16 able to attend a public hearing, depriving Petitioner of a full and fair hearing.

17 **II. The scheduled hearing poses health and safety risks to counsel.**

18 The scheduled hearing in the midst of the pandemic poses risks to the health
19 of defense counsel and counsel's family members. The probability for counsel to
20 recuse themselves remains high. (*See* Ex. A (filed under seal).) Apart from all other
21 reasons, this ground independently supports vacating the current scheduling order
22 and rescheduling the November hearing.

23 **Conclusion**

24 Petitioner has made good faith efforts to comply with this Court's scheduling
25 order for the evidentiary hearing. Counsel for Petitioner has timely made
26 disclosures required under the scheduling order, telephonically interviewed
27 witnesses, and conducted Zoom meetings with experts. However, counsel have
28

1 encountered insurmountable obstacles to their ability to effectively prepare for the
2 hearing. Indeed, district courts across the Ninth Circuit have found the obstacles
3 created by the pandemic to warrant equitable tolling of the AEDPA statute of
4 limitations, a “very high” threshold. *See Miranda v. Castro*, 292 F.3d 1063, 1066
5 (9th Cir. 2002); *see also Brown v. Davis*, No. 1:19-cv-01796-DAD, 2020 U.S. Dist.
6 LEXIS 156120 (E.D. Cal. Aug. 27, 2020); *Cowan v. Davis*, No. 1:19-cv-00745-
7 DAD, 2020 WL 4698968 (E.D. Cal. Aug. 13, 2020); *Dale v. Williams*, No. 3:20-
8 cv-00031-MMD-CLB, 2020 WL 4904624 (D. Nev. Aug. 20, 2020); *Banda v. High*
9 *Desert State Prison*, No. 2:19-cv-00989-KJD-VCF, 2020 WL 2926452 (D. Nev.
10 June 3, 2020); *Dunn v. Baca*, No. 3:19-cv-00702-MMD-WGC, 2020 WL 2525772
11 (D. Nev. May 18, 2020); *Maury v. Davis*, No. 2:12-cv-1043 WBS DB, 2020 WL
12 3065934 (E.D. Cal. Apr. 21, 2020). A full and fair hearing cannot be achieved under
13 the present circumstances, threatening the reliability of a proceeding with life and
14 death consequences. More time is needed. No prejudice will result from an
15 extension of time.

16 Petitioner understands that if the pandemic were expected not to abate within
17 a reasonable time, then accommodation might need to be made to the acceptable
18 methods of advocacy incidental to the fair administration of justice. But prevailing
19 scientific consensus suggests that is not anticipated to be necessary. Rather, there is
20 growing consensus that by early next year vaccines currently in the final stages of
21 clinical trials will turn the tide against the worst public health crisis in more than a
22 century. No objective necessity warrants litigating the Petitioner’s case to
23 conclusion, before making allowance for the pandemic to wane within a reasonable
24 time. No harm to the parties or this Court will transpire should the timeline to
25 completion be extended.

26 The penalty of death is “unique in both its severity and finality.” *Gardner v.*
27 *Florida*, 430 U.S. 349, 357 (1977). Especially in a capital case, Petitioner is
28 deserving of a full and fair opportunity to effectively present his case in accordance

1 with a fundamentally fair hearing with all available witnesses and evidence.
2 Therefore, for all the reasons set forth herein Petitioner respectfully asks the Court
3 to grant his unopposed request to vacate the scheduling order, reschedule the
4 November 9, 2020 hearing, and set a status hearing for January 29, 2021, or at such
5 other time convenient to the Court.

6 Respectfully submitted this 28th day of August, 2020.

7 Jon M. Sands
8 Federal Public Defender
9 District of Arizona

10 Nicole List
11 Lisa Gray
12 Kush Govani
13 Assistant Federal Public Defenders

14 s/Nicole List
15 Nicole List
16 Counsel for Petitioner
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Certificate of Service

I hereby certify that on August 28, 2020, I electronically filed the foregoing Motion to Vacate Current Scheduling Order and Reschedule Evidentiary Hearing with the Clerk's Office by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Kat Esparza
Assistant Paralegal
Capital Habeas Unit